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This is followed by an article by Matthew Townsend and Tim Robbins, in which they explore the feasibility of adopting a set of Asian Digital Dispute Resolution Rules to meet the demands of the digital economy. The next article, by Sima Ghaffari, discusses important issues of gender diversity and equal representation in the Iranian arbitration community, a subject of wider application and relevance worldwide.

With regard to alternative modes of dispute resolution, Eric Hong Ying Ngai discusses the pros and cons of adjudication and their application to the Hong Kong construction industry. Sophie Zhao Yue then follows with a discussion of the Chinese perspective on pre-arbitration alternative dispute resolution requirements.

For the In-house Counsel Focus article, Dantes Leung, Flora Ng & Davis Hui discuss recent developments relating to arbitrators' duty of disclosure, as well as the recourses available to parties in the event of non- or incomplete disclosure.

Finally, this issue concludes with the News section written by Robert Morgan.

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The Arbitrator's Duty of Disclosure: A Duty Without a Remedy?

Dantes Leung, Flora Ng & Davis Hui

This article examines critically the UK Supreme Court's reasoning on the legal duty of disclosure by arbitrators in the English *Halliburton* case by reference to the *ubi jus ibi remedium* maxim and analyses its implications for Hong Kong as an UNCITRAL Model Law jurisdiction. The authors argue that a failure to disclose should always disqualify an arbitrator and that no aggrieved party should be left without an appropriate remedy.

"Unless statute has intervened to restrict the range of judge-made law, the common law enables the judges, when faced with a situation where a right recognised by law is not adequately protected, either to extend existing principles to cover the situation or to apply an existing remedy to redress the injustice. There is here no novelty; but merely the application of the principle *ubi jus ibi remedium*."

- *Sidaway v Board of Governors of the Bethlem Royal Hospital and the Maudsley Hospital* [1985] AC 871, per Lord Scarman (House of Lords).

Introduction

Ubi jus ibi remedium - the maxim that where there is a right, there is a remedy - is a fundamental legal principle underpinning the justice system: the Court should provide an effective remedy where a right is infringed or where a corresponding duty is breached. It represents the responsibility and flexibility of

the law to redress any injustice. Any exception to this general principle should be properly justified.

Under section 25 of the Hong Kong Arbitration Ordinance (Cap 609),[1] an arbitrator has an express duty to disclose circumstances that are likely to give rise to justifiable doubts as to his or her impartiality, whereas in England & Wales this duty is implied in contract. One would expect the law to give an effective remedy in either jurisdiction where an arbitrator breaches this duty. In an English case, *Halliburton Co v Chubb Bermuda Insurance Ltd*,[2] however, the UK Supreme Court surprisingly opined otherwise: not only that the arbitrator who failed to observe this duty of disclosure should not be removed, but also that the innocent party should receive no remedy at all. *Quaere* whether this case sits well with the *ubi jus ibi remedium* maxim.

> "*Ubi jus ibi remedium* - the maxim that where there is a right, there is a remedy - is a fundamental legal principle underpinning the justice system: the Court should provide an effective remedy where a right is infringed or where a corresponding duty is breached. … Any exception to this general principle should be properly justified."

Background to the *Halliburton* case

The factual background of the *Halliburton* case is complicated, but for the purpose of this article, the essentials are as follows. The destruction of the Deepwater Horizon drilling rig as a result of an oil well blowout in the Gulf of Mexico in 2010 resulted in two separate arbitrations under which two companies, namely Halliburton and Transocean, claimed against a common insurer, Chubb, under their respective liability insurance policies containing the same material policy terms. Kenneth Rokison QC was first appointed as arbitrator in the Halliburton arbitration. He subsequently accepted Chubb's nomination as arbitrator in the Transocean arbitration, without first disclosing this to Halliburton.

Mr Rokison's appointment in the Transocean arbitration was discovered by Halliburton, which then applied to the High Court to remove him as arbitrator on the ground of apparent bias. In particular, it was argued that Mr Rokison's failure to disclose his proposed appointment in the Transocean arbitration, which concerned an overlapping subject-matter with only one common party (ie, Chubb), gave rise to justifiable doubts as to his impartiality.

The reasoning of the UK Supreme Court

It should be noted at the outset that, by contrast with the position in Hong Kong pursuant to the Arbitration Ordinance (Cap 609) (the Ordinance), which adopts the UNCITRAL Model Law (the Model Law), there is no express provision in the English Arbitration Act 1996 (the 1996 Act, which mirrors but has not adopted the Model Law) that imposes a duty on an arbitrator to disclose circumstances which might give rise to justifiable doubts as to his or her impartiality. Halliburton's challenge to the arbitral appointment in the Transocean case on the ground of apparent bias arising from non-disclosure presented an acute issue.

> "Halliburton's challenge to the arbitral appointment in the Transocean case on the ground of apparent bias arising from non-disclosure presented an acute issue."

The UK Supreme Court recognised that impartiality is a cardinal duty of an arbitrator.[3] While the objective test of the fair-minded and informed observer applies equally to judges and arbitrators, the Court noted the distinction between the judicial and arbitral determination of disputes.[4] Specifically, arbitral decisions, whether on issues of fact or law, are often not subject to appeal.[5] Coupled with the fact that arbitrations are private and confidential with very limited public oversight, there are legitimate causes for concern where, in multiple references of overlapping subject-matter in which the same arbitrator is appointed, the party who is not common to the overlapping references has no means of being informed of the evidence and legal submissions made before that arbitrator, thereby not being placed on the same level playing field.[6] Also of importance is that allegations of apparent (conscious or unconscious) bias are difficult to establish and to refute.[7]

“The duty of disclosure seeks to avoid, by employing a ‘sunshine device’ (ie, one that will expose any potential bias issue to the light of day), what could arguably give rise to a real possibility of bias. This enables the parties to consider the circumstances disclosed, obtain the necessary advice and decide upon such action as may be appropriate.”

It was against these observations that the Supreme Court held that there is a legal duty on the arbitrator under English law to disclose circumstances that would or might give rise to justifiable doubts as to his or her impartiality. This duty of disclosure is implied into the contract of appointment between the arbitrator and the parties and reinforced by the overriding statutory duty on arbitrators under s 33(1)(a) of the 1996 Act to act fairly and impartially in conducting arbitral proceedings.[8] The duty seeks to avoid, by employing a ‘sunshine device’ (ie, one that will expose any potential bias issue to the light of day), what could arguably give rise to a real possibility of bias. This enables the parties to consider the circumstances disclosed, obtain the necessary advice and decide upon such action as may be appropriate.[9]

That said, a failure of disclosure is only one factor to consider in determining whether an arbitrator is acting impartially. In other words, a failure to disclose may not necessarily be sufficient to establish bias and justify removal.[10] It was on this basis that the arbitrator in *Halliburton* was not removed even though he was held to have breached the duty to disclose his appointment in overlapping arbitrations, which might reasonably have given rise to the real possibility of bias. Applying the test of the fair-minded and informed observer, however, the Court was not persuaded that there was a real possibility of unconscious bias.[11]

A paper tiger spotted

Indeed, the risk of potential bias or injustice arising from the appointment of a common arbitrator in multiple arbitrations with overlapping subject-matter should not be underestimated. As demonstrated in the recent Hong Kong case of *W v AW*,[12] under appropriate circumstances a common arbitrator may be bound by the decision of another tribunal (of which he or she is a member) in a related arbitration, and inconsistent findings in related arbitrations between different arbitral tribunals with a common arbitrator may be set aside. The ‘sunshine device’ referred to earlier is useful in reducing the risk of potential injustice facing the non-common parties in that situation.

What is disappointing in the *Halliburton* case, however, is the net outcome that the arbitrator who defaulted in complying with the duty of disclosure walked away scot free, with no effective remedy being afforded to the innocent party and

seemingly contravening the *ubi jus ibi remedium* principle. A duty of disclosure that carries no legal consequences is meaningless in practice. If it is just a sub-test within the broader traditional bias test, it is unnecessary if not totally redundant for the court to take pains to expound its principles.

> "… [A] failure of disclosure is only one factor to consider in determining whether an arbitrator is acting impartially. In other words, a failure to disclose may not necessarily be sufficient to establish bias and justify removal. (*Halliburton*, per Lord Hodge)"

The duty of disclosure as currently formulated by the UK Supreme Court has degenerated into a paper tiger. This is highly unsatisfactory: the absence of serious legal consequences is likely to encourage non-compliance with the duty and create a mischief by running completely contrary to the need for transparency.

The UK Supreme Court was aware of this issue but categorically denied that there was no legal sanction for breach of the duty of disclosure.[13] Lord Hodge argued that non-disclosure itself *could* justify the removal of the arbitrator on the basis of justifiable doubts as to impartiality, and the arbitrator might be required to bear the costs of an unsuccessful challenge and his or her own defence costs.[14] Obviously, none of these arguments justify the anomaly.

Where non-disclosure does not lead to removal, it follows that there can be no legal sanction for the breach. It is not a good answer to say that the duty of disclosure has been taken into account in this circumstance. On the other hand, an award of costs in any challenge proceedings, properly conceived, is purely an exercise of judicial discretion, rather than a full-blown legal remedy to respond to and redress the breach itself.

The logical contradiction

Just as one might think that the duty of disclosure is not going anywhere, interestingly, Lord Hodge for the majority, with Lady Arden agreeing but adding further observations, unanimously opined that an arbitrator would *have to* decline the second appointment where he or she owes the parties a duty to disclose but cannot do so because of the duties of privacy and confidentiality owed to parties to the first appointment.[15] It follows logically that if the arbitrator accepts the second appointment in breach of the duty of disclosure, he or she should be removed since he or she would not have acted validly in the first place. This is significant because it directly contradicts the proposition that non-disclosure is but one factor to consider in the broader analysis of bias, which factor alone may *not necessarily* lead to the removal of an arbitrator.

> "… [T]he arbitrator in *Halliburton* was not removed even though he was held to have breached the duty to disclose his appointment in overlapping arbitrations, which might reasonably have given rise to the real possibility of bias. Applying the test of the fair-minded and informed observer, however, the Court was not persuaded that there was a real possibility of unconscious bias."

Taking the matter further, if an arbitrator should not act where he or she cannot make the mandatory disclosure in any event, it seems a *fortiori* that one who can disclose but fails to do so should also not act. In summary, what therefore matters appears not to be whether certain pre-existing privacy and confidentiality obligations prevent mandatory disclosure, but the failure to make the mandatory disclosure for whatever reason - which, in and of itself, would be sufficient to disqualify an arbitrator from acting, and lead to removal if he or she has so acted.

> "… [T]he risk of potential bias or injustice arising from the appointment of a common arbitrator in multiple arbitrations with overlapping subject-matter should not be underestimated."

Breathing life into the paper tiger

By contrast with the English 1996 Act, s 25 of the Hong Kong Ordinance, in adopting art 12(1) of the Model Law, expressly imposes a duty of disclosure on arbitrators. Thus, there is an even stronger argument that there should be an effective legal remedy to redress a breach of the duty of disclosure under Hong Kong law.

It is unfortunate that the *Halliburton* case was very much focused on the ground of bias. Applying the *ubi jus ibi remedium* principle in both jurisdictions, two legal remedies avail to put right an arbitrator's wrong: removal under sections 24(1)(a) and (b) of the 1996 Act and s 25 of the Ordinance, or contractual remedies under the common law.

The Ordinance provides an exclusive regime for intervention by the court in arbitration matters.[16] Any challenge to an arbitrator's appointment shall be in accordance with section 25, pursuant to which art 12(2) of the Model Law provides two gateways for removing an arbitrator: (1) on the ground of bias, or (2) for non-possession of qualifications agreed to by the parties.[17] Even accepting the UK Supreme Court's analysis that the fair-minded and informed observer would not necessarily conclude actual or apparent bias on the ground of non-disclosure, the second gateway may be applicable to remove an arbitrator who does not possess required qualifications.

The word "qualifications" in s 25 is not statutorily defined. It could arguably extend beyond professional qualifications and be interpreted to include a quality expected of an arbitrator. It is submitted that, by agreeing to submit their dispute to arbitration, the parties have implicitly agreed that an arbitrator shall possess the quality of performing all applicable duties, including the duty of disclosure. By failing to comply with the duty of disclosure, an arbitrator should be removed for not possessing this implicitly agreed qualification.

On the other hand, as hinted by Lady Arden in the *Halliburton* case, the breach of the duty of disclosure is a contractual breach which carries such consequences as contract law prescribes.[18] Regrettably, without elaborating on the potential consequences, her Ladyship quickly corrected herself by saying that arbitrators may incur no liability as a result of the breach.[19] Lord Hodge also "respectfully questioned" whether there is a basis in English law to claim damages relating to non-disclosure, particularly in light of the arbitrator's immunity under s 29 of the 1996 Act.[20]

With respect, there is no justification for the Court to jump to the conclusion that arbitrators incur no liability for non-disclosure. The immunity of arbitrators only applies to the exercise, performance and discharge of the arbitral function. It is important to note that the duty of disclosure attaches to any candidate arbitrator even *before* his or her appointment,[21] and hence arbitral immunity cannot exempt any liability arising from non-disclosure that is unrelated to any arbitral function that is (or is not) to be exercised, performed or discharged.

An award of damages against an arbitrator for non-compliance with the duty of disclosure is not unprecedented in other jurisdictions. In a French decision,[22] for example, the court held that the relationship between the arbitrator and the parties was contractual in nature and that this justified his liability being assessed on the basis of breach of contract. Apart from damages, there is no good reason why termination of the contract with an arbitrator should not be available as a remedy for breaching a statutorily implied duty of disclosure. The remedy of rescission should also be available where non-disclosure constitutes an implied misrepresentation on the part of the defaulting arbitrator.

> "… [Section] 25 of the Hong Kong Ordinance, in adopting art 12(1) of the Model Law, expressly imposes a duty of disclosure on arbitrators. Thus, there is an even stronger argument that there should be an effective legal remedy to redress a breach of the duty of disclosure under Hong Kong law."

Regardless of how the contract with the arbitrator is discharged, it may not automatically terminate the arbitrator appointment *per se*, because of the *sui generis* nature of the office.[23] This would be analogous to where the office of a director may not automatically vacate even though his or her contract of service has been terminated.[24] The significance of a discharge of the contract with an arbitrator is perhaps that a defaulting arbitrator may not claim his or her fees and may even be required to return fees already paid. Theoretically, it is up to the defaulting arbitrator to retain the appointment, but there may be moral obligations to consider resignation or to justify how the appointment could be retained without apparent bias in that situation.

> "Understandably, courts are generally supportive of arbitration and would not wish to intervene lightly. Where, however, confidence in arbitration could be undermined by non-disclosure, the courts should not hesitate to step in to maintain the structural integrity of the arbitration regime as a whole."

Conclusion

Paul Stanley QC argues that a rule which mandates disclosure of matters that would not disqualify is a fool's gold.[25] The UK Supreme Court's judgment in *Halliburton* unjustifiably contravenes the *ubi jus ibi remedium* principle, in that it gives no effective remedy for a breach of a legal duty. It appears that the Court has been overly protective of arbitrators in having jumped to the conclusion that they incur no liability or are exempt from liability for non-disclosure. Understandably, courts are generally supportive of arbitration and would not wish to intervene lightly. Where, however, confidence in arbitration could be undermined by non-disclosure, the courts should not hesitate to step in to maintain the structural integrity of the arbitration regime as a whole. As illustrated above, there exist remedies that could strike a fine balance between giving an effective remedy and non-intervention in arbitration. It is to be hoped that the courts will demonstrate flexibility in constructing remedies to redress any injustice arising from an arbitrator's breach of duty.

1 Which adopts art 12 of the 2006 version of the UNCITRAL Model Law on International Commercial Arbitration.

2 [2021] AC 1083.

3 *Ibid*, [49], per Lord Hodge.

4 *Ibid*, [55].

5 *Ibid*, [58].

6 *Ibid*, [56], [61].

7 *Ibid*, [70].

8 *Ibid*, [76]. *Editorial note*: Section 33(1)(a) of the 1996 Act does not contain a requirement as to disclosure: *ibid*, [29].

9 *Ibid*, [70].

10 *Ibid*, [117], [120], [155]-[157].

11 *Ibid*, [149].

12 [2021] HKCFI 1707.

13 *Halliburton*, *supra* (note 2), [111], per Lord Hodge, and [169], per Lady Arden.

14 *Ibid*, [111].

15 *Ibid*, [88], per Lord Hodge, and [188], per Lady Arden.

16 Section 12 of the Ordinance, which adopts art 5 of the Model Law, provides that "in matters governed by this Law, no court shall intervene except where so provided in this Law." Cf section 1(c) of the 1996 Act.

17 Section 25 of the Ordinance, in adopting art 12(2) of the Model Law, provides that "an arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties." Cf s 24(1)(a) and (b) of the 1996 Act., pursuant to which the High Court may remove an arbitrator on these grounds.

18 *Halliburton, supra* (note 2), [169], per Lady Arden.

19 *Ibid,* [169].

20 *Ibid*, [106]. Section 29 of the 1996 Act stipulates that "an arbitrator is not liable for anything done or omitted in the discharge or purported discharge of his functions as arbitrator unless the act or omission is shown to have been in bad faith." Cf s 104 of the Ordinance.

21 *Halliburton, supra* (note 2), [79]. In this regard, s 25 of the Arbitration Ordinance, in adopting art 12(1) of the Model Law, provides that "when a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence."

22 Gary B Born, *International Commercial Arbitration* (3rd Edn, 2020, Wolters Kluwer), [13.04A3]; *Judgment of 12 May 1993*, 1996 Rev Arb 411, at 411 (Paris Tribunal de Grande Instance).

23 *Ibid*, [13.03A].

24 Paul Kwan, *Hong Kong Corporate Law* (24th Edn, 2019, LexisNexis Hong Kong), [1853].

25 Paul Stanley, *Halliburton Company v Chubb Bermuda Insurance Ltd*, (2018), available at https://files.essexcourt.com/wp-content/uploads/2018/05/08152814/hburton.pdf (accessed 11 March 2022), p 16.